

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:)	Docket No. 07-2002-A-1432
)	
)	REVIEW DECISION AND FINAL ORDER
)	
)	
)	Area Agency on Aging-
)	Client Services
<u>Appellants</u>)	Client ID No. *****

I. NATURE OF ACTION

1. Administrative Law Judge Johnette Sullivan held a hearing and mailed an Initial Decision on August 28, 2002. In the Initial Decision, the Administrative Law Judge (ALJ) concluded that the Department must determine the date that the Appellant's pension was actually in ***** control and available to ***** . This matter was remanded back to the Department to recalculate the participation amount that the Appellant must pay to receive Community Options Program Entry System (COPES) benefits, based on the date ***** pension was available for ***** use.

2. The Appellant filed a petition for review of the Initial Decision on September 17, 2002. The Appellant's petition for review stated in part:

The Initial Decision notice, dated August 28, 2002, asks the Department of Social and Health Services (DSHS) to verify the date, in this case the "approximate" date, when ***** received ***** stipend from the Department of Retirement Systems (DRS).

DSHS has responded in a letter dated September 5, 2002, that the DRS delivers the monthly stipend checks to the post office four days from the last USPS delivery day of the month in order to get them delivered prior to the last delivery day of the month. In filing this appeal, it is still our contention that this check is not made available for use in the month for which it is intended since quite often it would fall on the last day of the month. In that ***** is also no longer able to drive ***** anywhere, ***** must await the assistance of friends or ***** care provider to take ***** to the bank and put the DRS check to use.

Further, it would seem that the Initial Decision seems to simplify the personal situation of ***** as presented at the telephonic hearing. The Initial Decision only states that ***** has "failing health, elderly condition, vision problems, and lack of ability to read and understand government requirements and forms."

While the above statement *basically* covers ***** situation, the tape recording of the hearing will also show that ***** only has a fifth grade education, that ***** suffers from Parkinson's Disease, diabetes, glaucoma, and that, according to a state-sponsored evaluation, is very "confused" at times. Finally, as noted at the hearing, it is upsetting to see that DSHS is setting ***** participation fee at a level that keeps ***** living at the top end of what DSHS deems to be "poverty level." The transcript of the hearing will bear this out.

As for the idea that ***** should have reported the increased payment sooner, ***** vision difficulties do not allow ***** to read normal print. Also ***** care giver is a native Spanish speaker who reads little English, and I, ***** , live 210 miles away in *****.

For the above reasons, it is requested that the overpayment be waived, or, at the minimum, the first month's overpayment be waived, since ***** reported the overpayment as soon as ***** realized it was to be received. However, in the event that it is determined that any portion of the overpayment is still owing, and since ***** will continue to live at the poverty level, we would ask that any overpayment be collected at the rate of five dollars per month.

II. FINDINGS OF FACT

The undersigned has reviewed the recorded transcript of the hearing, the documents admitted as exhibits, the Initial Decision, and the Appellant's petition for review and supplemental documents and determines that the Findings of Fact are supported by substantial evidence in the record and are adopted as findings in this decision. WAC 388-02-0600(2); RCW 34.05.464(8).

III. CONCLUSIONS OF LAW

1. The petition for review was timely filed and is otherwise proper. WAC 388-02-0560 through -0585. Jurisdiction exists to review the Initial Decision and to enter the final agency order. WAC 388-02-0530(2), -0535, and -0570.

2. ALJs and Review Judges must first apply the DSHS rules adopted in the Washington Administrative Code (WAC). If no DSHS rule applies, the ALJ or Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions. WAC 388-02-0220.

3. A Review Judge may change an initial decision only if a party shows one of the following: (1) irregularity affecting the fairness of the hearing; (2) findings of fact that are unsupported by substantial evidence in the record; (3) a need for additional consistent findings of fact based upon substantial evidence in the record; (4) an error of law; or (5) a need for clarification in order to implement the decision. WAC 388-02-0600(2).

4. The Appellant is a recipient of long-term care medical benefits through the COPES program. (See initial Finding of Fact 1.) As a recipient of COPES benefits, and based on ***** monthly income, the Appellant may be required to participate in the cost of ***** medical care. WAC 388-515-1505. When a recipient's monthly income increases, the Department must calculate a new participation amount beginning with the month that the recipient's income changed. WAC 388-418-0020(7)(d). In April 2002, the Appellant's income increased when ***** began receiving an increased pension amount from the Washington State Retirement System. (See initial Finding of Fact 4.) Because the Appellant's income increased in April 2002, the Department was required to calculate ***** new participation amount to begin in April 2002.

5. In initial Conclusions of Law 3, 5, 7, and 8, the ALJ determined that the Department must re-calculate the Appellant's participation amount based on the date that the additional income was actually "available" for ***** use. These conclusions were incorrectly based on WAC 388-450-0005 and are not accepted as Conclusions of Law for this decision. The Department was not required to determine the exact date that the new income amount was available to the recipient because WAC 388-450-0005 only applies to cash assistance, medical programs for children, pregnant women, families, and food assistance. The correct rule outlining when the Appellant's participation amount must change is WAC 388-418-0020(7)(d). As stated in Conclusion of Law 4, above, the Department correctly calculated the Appellant's new participation amount beginning April 2002, the month that ***** income changed.

6. When a COPES recipient's income changes or they begin to get money from a

new source, they are required to report the change to the Department within twenty days. WAC 388-418-0005, -0007. If the change is reported late and the recipient receives benefits in excess of the amount they were entitled, an overpayment results. WAC 388-410-0001. The Department is required to collect overpayments of medical assistance. WAC 388-410-0005. It is uncontested that the Appellant failed to notify the Department of ***** income change within the twenty days allowed by law. Because of this failure ***** received benefits to which ***** was not entitled and an overpayment resulted. The Department was correct in establishing and attempting to collect this overpayment.

7. The Appellant asserts that it is not appropriate for the Department to establish or collect this overpayment because it would result in a hardship to ***** . A defense based on the detrimental reliance of one party on the actions or representations of another party is commonly known as equitable estoppel. The WAC requires the ALJ or Review Judge to consider the defense of equitable estoppel when the facts of the case indicate that equitable estoppel applies to a party in the hearing. The Department rule addressing the defense of equitable estoppel references the defense as defined by case law. WAC 388-02-0495(1). This reference requires consideration of the precedents set by reported Washington State appellate case law regarding the equitable estoppel defense and a review of the relevant case law is essential in rendering a decision in this case.

8. The doctrine of equitable estoppel is applicable when a party, by their acts or representations, causes another to change his/her position to his/her detriment. In such a case, the party who performs such acts or makes such representations will be precluded from asserting to their own advantage the conduct or forbearance of the other party. *Hartman v. Smith*, 100 Wn.2d 766, 769, 674 P.2d 176 (1984). The party who asserts equitable estoppel must establish:

- (1) *an admission, statement, or act inconsistent with the claim afterward asserted;*
- (2) *action by the other party on the faith of such admission, statement, or act; and*

(3) injury resulting from allowing the first party to contradict or repudiate [such admission, statement, or act].
In re Hunter, 52 Wn. App. 265, 758 P.2d 1019 (1988).

9. A party asserting equitable estoppel against either the government or a private party must prove each element of estoppel with clear, cogent and convincing evidence. *Kramarevsky v. DSHS*, 122 Wn.2d 738, 863 P.2d 535 (1993). The relevant Department rule sets the standard of proof as *clear and convincing*. WAC 388-02-0495(2). Consistent with the decision in the *Hunter* case, the Washington Supreme Court in the *Kramarevsky* case set out the elements of equitable estoppel as: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Kramarevsky, supra*, at 743. The court found that equitable estoppel against the government is not favored and that the courts should be most reluctant to find the government equitably estopped when public revenues are involved. *Kramarevsky, supra*, at 744. For this reason, the court found that two additional requirements must be met when the defense is asserted against the government: equitable estoppel must be necessary to prevent manifest injustice and the exercise of governmental functions must not be impaired as a result of the estoppel. *Kramarevsky*, at 743.

10. The Department's equitable estoppel rule restates the elements set forth by the court in *Kramarevsky* but also attempts to clarify each element by example. The rule is reproduced below because it is critical to the analysis in this case:

What is equitable estoppel? (1) Equitable estoppel is a legal doctrine defined in case law that may prevent DSHS from taking some action against you, such as collecting an overpayment.

(2) There are five elements of equitable estoppel. The standard of proof is clear and convincing evidence. You must prove all of the following:

(a) DSHS made a statement or took action or failed to take action, which is inconsistent with a later claim or position by DSHS. For example, DSHS gave you money based on your application, then later tells you that you received an overpayment and wants you to pay the money back based on the same information.

(b) You relied on DSHS' original statement, action or failure to act. For example,

you believed DSHS acted correctly when you received money.

(c) You will be injured to your detriment if DSHS is allowed to contradict the original statement, action or failure to act. For example, you did not seek help from health clinics or food banks because you were receiving benefits from DSHS and you would have been eligible for these other benefits.

(d) Equitable estoppel is needed to prevent a manifest injustice. For example, you cannot afford to repay the money to DSHS, and you gave DSHS timely and accurate information when required but did not know that DSHS made a mistake.

(e) The exercise of government functions is not impaired. For example, the overpayment was not your fault and it was caused solely by a DSHS mistake.

(3) If the ALJ concludes that you have proven all of the elements of equitable estoppel in subsection (2) of this section with clear and convincing evidence, DSHS is stopped or prevented from taking action or enforcing a claim against you. WAC 388-02-0495.

11. The fourth element of the defense, and the one applicable only to assertion of the defense against the government, requires the Appellant to show that ***** would suffer *manifest injustice* if DSHS were not equitably estopped from collecting the COPES benefits issued to ***** in error. The supreme court decision requires the party asserting the defense to show: (1) the respondents did not have the resources to repay the debt without drawing on funds currently needed to meet their most basic needs; (2) the respondents provided DSHS with timely and accurate information and the overpayments resulted solely from the Department's error; (3) the overpayments involved a continuation of benefits for which the respondents had been eligible and there was no reason they would have been alerted to the fact of overpayment; and (4) there was no evidence the respondents were abusing the public assistance system. *Kramarevsky, supra*, at 748-749.

The evidence is clear that the Appellant does not meet the requirements as detailed for this element because ***** did not provide the Department with timely and accurate information. The Appellant failed to timely inform the Department regarding the increase in ***** monthly income, and this error was the sole reason for the overpayment of medical assistance. After failing to provide timely and accurate information to the Department, the Appellant cannot now assert a defense of equitable estoppel because ***** cannot show with clear and convincing evidence that this defense is needed to prevent a manifest injustice. WAC

388-002-0495(2)(d). A defense of equitable estoppel is not available to the Appellant under these circumstances.

12. The undersigned has considered the Initial Decision, the petition for review, and the entire record or the documents provided by the parties. Initial Conclusions of Law 1, 2, 4, and 6 cited and applied the governing law correctly and they are adopted as Conclusions of Law in this decision. WAC 388-02-0600(2); RCW 34.05.464(8). Initial Conclusions of Law 3, 5, 7, and 8 included an error of law or were based on an erroneous conclusion and are not adopted as Conclusions of Law in this decision. WAC 388-02-0600(2)(c). The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

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IV. DECISION AND ORDER

1. The Initial Decision is modified.
2. The Department correctly calculated the Appellant's increased long-term care medical benefits participation amount to begin in April 2002.
3. The Department correctly established an overpayment against the Appellant for long-term care medical benefits paid to ***** in error.
4. The Department is not barred from collecting this overpayment by the doctrine of equitable estoppel.

Mailed on January 13, 2003.

THOMAS L. STURGES
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: ***** , Appellant
***** , Appellant's Representative
Carol Fredrickson, Department Representative, ***** HCS
Evelyn Cantrell, *****
Sue McDonough, *****
Johnette Sullivan, ALJ, ***** OAH